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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

HOLLY KEY,

Defendant and Appellant.

D069640

(Super. Ct. No. SCN352825)

APPEAL from an order of the Superior Court of San Diego County, Michael J. Popkins, Judge. Portion of order stricken and remanded with directions.

Ashley N. Johndro, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Kimberley A. Donohue, Deputy Attorneys General, for Plaintiff and Respondent.

Following Holly Key's guilty plea to possession of marijuana for sale (Health & Saf. Code, § 11359), the trial court suspended imposition of sentence and placed Key on formal felony probation for a period of three years, including as a condition of probation that Key submit her "computers" and "recordable media" to search at any time (the electronic search condition).

Key contends that the electronic search condition is invalid because it is unconstitutionally overbroad. We conclude that Key's argument has merit. Accordingly, we order that the electronic search condition be stricken, and we remand the matter to the trial court to consider whether, and how, the electronic search condition can be more narrowly tailored.

I.

FACTUAL AND PROCEDURAL BACKGROUND

While driving a car that had been reported stolen by a rental car agency, Key was pulled over by the California Highway Patrol.¹ Upon searching the vehicle, officers found approximately 1,420 grams of marijuana in the rear hatch area. Key was charged with one count of importing and transporting marijuana into California (Health & Saf. Code, § 11360, subd. (a)) and one count of possession of marijuana for sale (Health & Saf. Code, § 11359).

¹ We base our recitation of the facts on the probation officer's report.

Key pled guilty to possession of marijuana for sale (Health & Saf. Code, § 11359) in exchange for an agreement that the People would dismiss the remaining count and that Key would be sentenced to time served in local custody and placed on probation.

At the sentencing hearing on January 8, 2016, defense counsel objected to conditions of probation that would require Key to allow searches of her electronic devices. Defense counsel's objection appears to have been occasioned by an addendum to the probation order which Key was asked to sign, under which she would acknowledge and accept a waiver of her rights as to searches under the Fourth Amendment to the United States Constitution (the Addendum). The Addendum specifically referenced Key's consent to provide information that would otherwise be protected by the California Electronic Communications Privacy Act (Pen. Code, § 1546, et seq.) (the ECPA).² Regarding the ECPA, the Addendum stated that Key agreed to the examination of "call logs, text and voicemail messages, photographs, e[-]mails, and social media account contents contained on any device or cloud or internet connected storage owned, operated, or controlled by the defendant, including but not limited to mobile phones, computers, computer hard drives, laptops, gaming consoles, mobile devices, tablets, storage media devices, thumb drives, Micro SD cards, external hard drives, or any other electronic

² The Addendum erroneously referred to the ECPA as the California Electronic *Communication Protection* Act. We note that the ECPA went into effect on January 1, 2016 (Stats. 2015, ch. 651, § 1), which was only seven days before Key's January 8, 2016 sentencing hearing. Based on defense counsel's statements at the sentencing hearing, it appears that he was seeing the language in the Addendum concerning the ECPA for the first time at that hearing.

storage devices." The Addendum also required Key to "disclose any and all passwords, passcodes, password patterns, fingerprints, or other information required to gain access into any of the aforementioned devices or social media accounts."

At the outset of the sentencing hearing, defense counsel originally asked for a continuance so that he could properly brief his objections to the Addendum. He then changed his mind about the continuance and instead proceeded to explain generally that "the conditions requested are unconstitutional, invalid, based upon a variety of reasons." Among other things, defense counsel made the point that access to "electronic information is fundamentally different and allows a much greater scope" of intrusion than a physical search of a probationer's home or car. Defense counsel cited objections under "the 4th, 5th, 6th and 14th amendment, and the California Constitution."

The trial court rejected defense counsel's argument and required Key's agreement to the Addendum as a condition of probation. The trial court explained, "Well, in this case your client is currently charged with a drug-related offense. She has a history of drug-related offenses, at least one other one. And I do think it's necessary for probation in order to make sure she's not engaged in any illegal activity to make sure she is properly supervised to have that Addendum on there as a search condition. And she's going to have a [Fourth] Amendment waiver anyway on this case."

Key signed the Addendum and the trial court entered an order granting formal probation. The order includes, as one of the conditions of probation, that Key shall "[s]ubmit person, vehicle, residence, property, personal effects, *computers*, and

recordable media to search at any time . . . when required by [a probation officer] or law enforcement officer." (Italics added.)

Key filed a notice of appeal on January 25, 2016.³

On May 18, 2016, the parties entered into a stipulation, approved by the trial court, which invalidated the Addendum, nunc pro tunc, to the date it was imposed. However, the terms of the stipulation, on its face, did not apply to any of the probation conditions in the order granting formal probation. Thus, Key remains subject to the probation condition requiring that she submit her "computers . . . and recordable media to search."

II.

DISCUSSION

Key's sole argument on appeal is that the electronic search condition is unconstitutionally overbroad as it is not narrowly tailored to avoid unnecessary infringement of her right to privacy.⁴

³ In *In re Holly Key on Habeas Corpus*, case No. D070490, Key filed a petition for habeas corpus on June 15, 2016, seeking an order striking the electronic search condition on the ground that defense counsel was ineffective in failing to object to that condition on the ground that it was unreasonable as applied to Key under the standard set forth in *People v. Lent* (1975) 15 Cal.3d 481, 486 (*Lent*). We deny Key's motion to consolidate case No. D070490 with this appeal, and we address the petition for habeas corpus in a concurrently filed order.

⁴ We note that our Supreme Court has granted review in several cases involving electronic search conditions imposed in cases involving juveniles. (*In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted Feb. 17, 2016, S230923; *In re Patrick F.* (2015) 242 Cal.App.4th 104, review granted Feb. 17, 2016, S231428; *In re Alejandro R.* (2015) 243 Cal.App.4th 556, review granted Mar. 9, 2016, S232240; *In re J.R.* (Dec. 28, 2015, A143163) [nonpub. opn.], review granted Mar. 16, 2016, S232287; *In re Mark C.* (2016) 244 Cal.App.4th 520, review granted Apr. 13, 2016, S232849; *In re A.S.* (2016)

It is without question that a person has a constitutional right to privacy in the content of his or her electronic devices, protected from search by the Fourth Amendment. (*Riley v. California* (2014) 573 U.S. ____ [189 L.Ed.2d 430, 134 S.Ct. 2473] [law enforcement officers generally must secure a warrant before searching the digital content of a cell phone incident to an arrest]; *People v. Appleton* (2016) 245 Cal.App.4th 717, 724 (*Appleton*) [stating that "[i]t is well established that individuals retain a constitutionally protected expectation of privacy in the contents of their own computers," and observing that "[m]uch of the reasoning in *Riley* — which recognized how the immense storage capacity of modern cell phones allows users to carry large volumes of data — would apply to other modern electronic devices"].) Here, by requiring that Key submit her computers and recordable media to search, the electronic search condition in the order granting probation unquestionably imposes a limitation on Key's Fourth Amendment rights.

"[A]dult probationers, in preference to incarceration, validly may consent to limitations upon their constitutional rights." (*People v. Olguin* (2008) 45 Cal.4th 375,

245 Cal.App.4th 758, review granted May 25, 2016, S233932; and *In re A.D.* (Apr. 26, 2016, A146136) [nonpub. opn.], review granted June 29, 2016, S234829.) The First District's opinion in the lead case of *In re Ricardo P.* decided two issues: (1) whether the electronic search condition was reasonable under *Lent, supra*, 15 Cal.3d 481; and (2) whether it was unconstitutionally overbroad. We note as well that although some of the overbreadth analysis in *In re Ricardo P.* was based on considerations unique to juveniles, our Supreme Court has also granted review in adult criminal matters pending the outcome of *In re Ricardo P.* (See *People v. Vasquez* (Mar. 7, 2016, H039956) [nonpub. opn.], review granted May 25, 2016, S233855; and *People v. Prado* (Dec. 4, 2015, H039931) [nonpub. opn.], order holding for new lead case Sept. 21, 2016, S229938.)

384.)⁵ However, "[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) Specifically, the issue is "whether the condition is closely tailored to achieve its legitimate purpose." (*Olguin*, at p. 384.) "It is not enough to show the government's ends are compelling; the means must be carefully tailored to achieve those ends." (*People v. Harrison* (2005) 134 Cal.App.4th 637, 641.) "The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant's constitutional rights — bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement." (*In re E.O.* (2010) 188 Cal.App.4th 1149, 1153.)

"With respect to the standard of review, while we generally review the imposition of probation conditions for abuse of discretion, we review constitutional challenges to probation conditions de novo."⁶ (*Appleton, supra*, 245 Cal.App.4th at p. 723.)

⁵ "When an offender chooses probation, thereby avoiding incarceration, state law authorizes the sentencing court to impose conditions on such release that are 'fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and . . . for the reformation and rehabilitation of the probationer.' ([Pen. Code,]§ 1203.1, subd. (j).) Accordingly, . . . a sentencing court has 'broad discretion to impose conditions to foster rehabilitation and to protect public safety pursuant to Penal Code section 1203.1.' " (*People v. Moran* (2016) 1 Cal.5th 398, 403 (*Moran*).)

⁶ We note that although a defendant forfeits a challenge to the reasonableness of probation conditions under *Lent, supra*, 15 Cal.3d 481, by not making a specific

Here, the trial court stated that the purpose of the electronic search condition is "to make sure [Key is] not engaged in any illegal activity" by providing tools for the probation officer to "make sure she is properly supervised." Similarly, the People state that the purpose of the electronic search condition is to "address [Key's] future criminality." In light of this expressed purpose, Key argues that the electronic search condition "is fatally not narrowly tailored to prevent future criminal activity." Key contends that the electronic search condition is overbroad because the court could impose "less restrictive alternatives to meet the People's goal of preventing future criminal activity." Key does not suggest how the electronic search condition could be narrowed to alleviate the overbreadth problem, stating that she "questions whether the Court could modify the electronic search condition to adequately preserve [Key's] constitutional rights."

In support of her argument that the electronic search condition is impermissibly overbroad, Key relies primarily on the Sixth District's opinion in *Appleton, supra*, 245

reasonableness challenge in the trial court (*People v. Welch* (1993) 5 Cal.4th 228, 237), "[e]ven absent an objection, a defendant may, on appeal, argue a condition is unconstitutional if the claim presents a ' " 'pure question[] of law that can be resolved without reference to the particular sentencing record developed in the trial court.' " ' " (*Moran, supra*, 1 Cal.5th at p. 403.) Here, to the extent that Key now raises an overbreadth challenge that requires reference to the particular sentencing record, we conclude that the challenge is not forfeited, as defense counsel *did* raise an overbreadth challenge in the trial court to the electronic search condition sufficient to preserve the challenge on appeal. Although defense counsel's argument was primarily focused on the content of the Addendum, which is no longer at issue, defense counsel's comments can fairly be read as a general objection to the unlimited scope of the electronic search condition, even as that condition is set forth in the order granting formal probation, as requiring that Key submit to a search of her "computers . . . and recordable media." We therefore conclude that Key has not forfeited her overbreadth challenge to the electronic search condition.

Cal.App.4th 717. In *Appleton*, the defendant, who pled no contest to false imprisonment by means of deceit, challenged the probation condition providing that "[a]ny computers and all other electronic devices belonging to the defendant, including but not limited to cellular telephones, laptop computers or notepads, shall be subject to forensic analysis search for material prohibited by law." (Id. at p. 721.) *Appleton* concluded that the electronic search condition was overbroad because it "would allow for searches of vast amounts of personal information unrelated to defendant's criminal conduct or his potential for future criminality." (Id. at p. 727.) As *Appleton* observed, "a search of defendant's mobile electronic devices could potentially expose a large volume of documents or data, much of which may have nothing to do with illegal activity. These could include, for example, medical records, financial records, personal diaries, and intimate correspondence with family and friends." (Id. at p. 725.) *Appleton* accordingly ordered that the electronic search condition be stricken as overbroad, and it remanded the matter to the trial court to consider whether the trial court could "impose a valid condition more narrowly tailored to the state's interests." (Id. at p. 727.) Key argues that the electronic search condition at issue in this case is similarly overbroad because it is not narrowly tailored for the purpose of supervising her to prevent future criminal activity, as the access to her computers and devices containing recordable media "constitute a digital record or nearly every aspect of her life," including "her most intimate details, . . . her every move, her political and religious associations, and her sexual expression and thought," and thus reaches more broadly than necessary to monitor her future criminality.

Key also relies on the opinion of Division One of the First District in *In re P.O.* (2016) 246 Cal.App.4th 288 (*In re P.O.*). *In re P.O.* determined that *Appleton, supra*, 245 Cal.App.4th 717, was persuasive on the overbreadth issue and concluded that a probation condition imposed on a juvenile requiring him to " '[s]ubmit . . . electronics including passwords under [his] control to search' " was overbroad. (*In re P.O.* at p. 292.)

The People, in contrast, advocate that we decline to follow *Appleton* and instead follow a decision of Division Four of the First District, in which our Supreme Court granted review after the People filed their brief in this case. (*In re J.E.* (2016) 1 Cal.App.5th 795 (*In re J.E.*), review granted Oct.12, 2016, S236628.) In *In re J.E.*, the minor was required as a condition of probation to submit to a search of his " 'electronics, including passwords.' " (*Id.* at p. 798.) *In re J.E.* explained that although a different division of the First District had concluded in *In re P.O., supra*, 246 Cal.App.4th 288, that a nearly identical electronic search condition was overbroad, the case before it differed because the minor's case was especially severe, which "require[d] intensive supervision to ensure his compliance with his probation conditions." (*In re J.E.*, at p. 805.) Even had our Supreme Court not granted review, we would not find *In re J.E.* to be persuasive here for two reasons. First, unlike the minor in *In re J.E.*, there is no indication in Key's criminal history or the details of the instant offense that would indicate she requires especially intensive supervision to address future criminality. More importantly, *In re J.E.* was a juvenile wardship proceeding. As *In re J.E.* recognized, a minor is " 'deemed to be more in need of guidance and supervision than adults, and . . .

[his] constitutional rights are more circumscribed. The state, when it asserts jurisdiction over a minor, stands in the shoes of the parents . . . [and] may "curtail a child's exercise of . . . constitutional rights." ' ' " (*In re J.E.*, *supra*, at p. 805, quoting *In re Antonio R.* (2000) 78 Cal.App.4th 937, 941.)

This case is also not like *People v. Ebertowski* (2014) 228 Cal.App.4th 1170, which was cited in *In re J.E.* during its discussion of overbreadth. (*In re J.E.*, *supra*, 1 Cal.App.5th at p. 805.) In *Ebertowski*, the defendant pleaded no contest to making criminal threats and resisting or deterring an officer, and he admitted a gang allegation. (*Ebertowski*, at p. 1172.) The trial court imposed a condition of probation stating that " [t]he defendant shall provide all passwords to any electronic devices (including cellular phones, computers or notepads) within his or her custody or control and shall submit said devices to search at anytime [*sic*] without a warrant by any peace officer.' " (*Id.* at p. 1173.) *Ebertowski* concluded that the electronic search condition was not overbroad, as the defendant had a history of promoting his gang on social media, and "access to all of defendant's devices and social media accounts *is the only way to see if defendant is ridding himself of his gang associations and activities*, as required by the terms of his probation, or is continuing those associations and activities, in violation of his probation." (*Id.* at p. 1175, italics added.) The court explained that defendant had not suggested how the electronic search condition could be more closely tailored to "the purpose of monitor[ing] and suppress[ing] defendant's gang activity." (*Ibid.*) Here, in contrast, the articulated purpose for having access to Key's electronic devices is much less compelling and much less specific. Unlike in *Ebertowski* where the electronic search condition was

necessary because of a specific concern about gang activity on social media, there has been no showing here that broad permission to search any of Key's electronic devices is "the only way to see" if Key is remaining law abiding. (*Ibid.*)

In sum, we do not find the People's argument for rejecting the holdings in *Appleton* and *In re P.O.* to be persuasive. As in those cases, the electronic search condition imposed on Key is very broad and the People have not attempted to articulate how the provisions of the electronic search condition are narrowly tailored to the purpose of monitoring Key's future criminality.

Although Key takes the position that no electronic search condition can be sufficiently tailored to avoid an unnecessary infringement on her privacy rights given the circumstances presented by her case, we decline to reach that issue and instead remand the matter to the trial court to decide, in the first instance, whether and how to fashion an appropriate electronic search condition. In so deciding, we have kept in mind that during the sentencing hearing the trial court was under the assumption that the Addendum would become part of the electronic search condition, and it therefore did not have the opportunity to decide whether the reference to "computers . . . and recordable media" could be effectively narrowed. Under those circumstances, it is appropriate to give the trial court an opportunity to address the issue in the first instance.

We accordingly order that the electronic search condition in the formal order of probation referring to the search of "computers . . . and recordable media" be stricken as overbroad, and the matter be remanded to the trial court to consider whether, and how,

the electronic search condition can be narrowly tailored to addressing Key's future criminality.

DISPOSITION

We strike the portion of the formal order of probation requiring Key to submit her "computers . . . and recordable media" to search, and we remand to the trial court with directions to consider whether and how the electronic search condition can be more narrowly tailored.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

BENKE, J.